

MEMORANDUM

TO: Members, Clark Fork Basin Water Management Task Force (Task Force)
FROM: Gerald Mueller
SUBJECT: Summary of the February 5, 2007 Task Force Meeting
DATE: February 16, 2007

Participants

The following people participated in the Task Force meeting:

Task Force Members:

Holly Franz	PPL Montana
Harvey Hackett	Bitterroot Water Forum
Fred Lurie	Blackfoot Challenge
Marc M. Spratt	Flathead Conservation District/Flathead Chamber of Commerce
Nate Hall	Avista
Jim Dinsmore	Granite Conservation District

Ex Officio Member

Sen. Verdell Jackson

Staff:

Gerald Mueller	Consensus Associates
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Public

Tim Hall	DNRC Chief Legal Counsel
Rich Moy	DNRC Water Management Bureau
Mike McLane	DFWP

Meeting Agenda

- January 8, 2007 Meeting Summary
- House Joint Resolution 3 Implementation Update
- Senator Jackson's January 24, 2007 Letter to Mary Sexton
- Legislative Updates
- Public Comment
- Next Meeting

January 8, 2007 Meeting Summary

The Task Force made no change to the January 8, 2007 meeting summary.

House Joint Resolution 3 Implementation Update

DNRC and Governor's Office Positions - Gerald Mueller has recently visited with both Mary Sexton and Hal Harper. Mary Sexton stated that DNRC will not be able to support HB 443, the appropriation requests for the Hungry Horse contracting (\$260,000), and HB 444, the Task Force FY 2008-09 funding, because neither were apart of the governor's budget. DNRC will testify as an informational witness on both HB 443 and 444. Ms. Sexton also indicated concern about proceeding with the contracting prior to resolution the Confederated Salish and Kootenai Tribal water rights. She also wondered about the likelihood that a contract will be possible, given the constraints imposed on the operation of Hungry Horse by the Columbia River endangered and threatened salmon and steelhead stocks. Both DNRC and Hal Harper will support the water marketing bill.

SB 376 Testimony - The Task Force reviewed the draft testimony on SB 376, the water marketing bill, prepared by Gerald Mueller and circulated to the Task Force prior to this meeting. Except for correcting the bill number from SB 378 to SB 376, no changes were made to the draft. Mr. Mueller will present this testimony to the Senate Natural Resources Committee this afternoon. See Appendix 1 for a copy of the testimony.

Senator Jackson's January 24, 2007 Letter to Mary Sexton

Senator Jackson discussed his letter to Mary Sexton. See Appendix 2. He stated that he recently reviewed the record of the 32nd session of the Montana Legislature and found support for his view that 85-1-122 MCA subordinates power generation water rights in the Clark Fork River basin to protect water for irrigation and consumptive uses from all present and future power generation rights in the watershed. Attached to his letter is an excerpt of the session report addressing 85-1-122 MCA. In the letter, Senator Jackson pointed out that:

Comments by Governor John Bonner, 32nd Legislative Assembly, Chapter 3 stated that 85-1-122, MCA was approved by the Attorney General as legally safe-guarding Montana water for irrigation and consumptive purposes above the Cabinet Gorge dam for the entire water shed, including subsequent dams. Legislative committee notes on SB9 and county commissioner meetings also indicate that 85-1-122 applies to all subsequent dams and indicates that section 85-1-122, MCA was a condition precedent to the construction of the dams and had to expressly be accepted by the dam owners.

Senator Jackson stated that the session report indicates that the legislature was aware that construction of Noxon Rapids Dam would follow Cabinet Gorge Dam, and that subordinating the hydropower rights only between these two dams would not make sense. He also noted that he has shared the session report with the Legislative Code Commission Greg Petesch, and Mr. Petesch agreed with his interpretation.

Senator Jackson closed the letter to Director Sexton by asking that DNRC either amend Avista's water right certificates or add issue remarks clarifying that the rights were subordinated to present and future irrigation and consumptive water rights.

Tim Hall, DNRC's Chief Legal Counsel responded to Senator Jackson's position. He stated that DNRC has been aware of Senator Jackson's information. However, several factors argue against the subordination. First, the rules of statutory interpretation state that if the language of the statute is clear, then session report language is moot. Mr. Hall noted that 85-1-122 states that "Any present or future appropriations of water in the water shed in the state of Montana for irrigation and domestic use above said dam shall have priority over water for power use at said dam." Thus the statute clearly limits its effect to "said dam", i.e. Cabinet Gorge. Similar language was not enacted for Noxon Rapids Dam, so the subordination occurs only up to the Noxon Rapids Dam and does not extend upriver. Also, DNRC sought to subordinate the Noxon power generation rights to upstream rights through Avista's hydropower license issued by the Federal Energy Regulatory Commission (FERC). DNRC's effort was not successful.

Holly Franz agreed with Mr. Hall. She said that her research into the legislative history of 85-1-22 and the subsequent failure of the legislature to enact a similar subordination provision for Noxon Rapids Dam, meant that the subordination did not extend upstream of this project.

Both Mr. Hall and Ms. Franz agreed that while lawyers have opinions about what statutes mean,

the only opinion that matters is that of the lawyer who is sitting as the judge hearing the case about it. The Task Force then discussed whether and how someone might go about seeking an opinion by the attorney general about this subordination controversy. Such an opinion would have the force of law until it is reviewed and overturned by a court. Members also noted that the Montana Water Court has not ruled on the status of water storage. Whether someone can obtain a storage water right per se has not been decided.

Task Force Action - The Task Force asked Mr. Mueller to contact the attorney general's office to ask that a spokesperson for that office attend the next Task Force to discuss the process for obtaining an attorney general opinion and how someone might obtain action by the Water Court to decide on the storage right issue.

Legislative Updates

The Task Force discussed the following bills.

SB 324 - This is the Task Force bill sponsored by Senator Jackson to require that state agencies send pump test data to the Montana Bureau of Mines and Geology and that well drillers report the location of their wells using two methods. It has passed the Senate Natural Resources committee on a 9-0 vote.

HB 304 - This bill, sponsored by Rep. Furey, would establish an interim legislative water policy committee. The Task Force reviewed and agreed to have Holly Franz give the supportive testimony attached in Appendix 3 on its behalf at the House Natural Resources hearing on February 7, 2007.

HB 104 - This bill, sponsored by Rep. Furey at the request of DNRC, would have tightened the 35 gpm, 10 acre-feet per year exemption for ground water wells. It was tabled in House Natural Resources.

HB 138 and 373 - These bills, sponsored by Rep. McNutt, would allow ground water augmentation in closed basins and amend various portions of statutes related to ground water. HB 138 is a DNRC bill; HB 373 seeks to limit the effect of the DNRC vs. TU decision by Montana Supreme Court. The Task Force requested that Mr. Mueller draft testimony in support of HB 138 and circulate it to Task Force members for their review and comment. The testimony should make the following points:

- A primary concern of the Task Force is protecting existing water rights.
- The Task Force supports HB 138, because it acknowledges the connection between surface and ground water and through augmentation attempts to ensure that additional ground water development does not adversely affect surface water and existing water rights.
- Limiting basin closure "municipal" exceptions to incorporated areas may drive subdivision development in unincorporated areas to use of individual exempt wells when a community well would otherwise be in the public interest.
- The Task Force does not support substituting the requirement that a report be prepared by a professional engineer or hydrologist with looser language "person educated and experienced in ground water science."
- The Task Force opposes changing the language that the augmentation plan must provide for "sufficient augmentation water in amount, time, and location to replace depletions to senior water rights" to "reasonably replace, in each reach affected, the amount of water that will be consumed by the proposed new use." The "reasonably replace" language will provide less protection for senior water rights.

SB 248 - This bill is the USFS water rights compact. It passed the Senate on a unanimous vote.

Public Comment

There was no additional comment.

Next Meeting

The next meeting was scheduled for 10:00 am on Monday, March 5, 2007 in the Bannock Conference Room of the DNRC offices at 1625 11th Avenue in Helena.

Appendix 1
Testimony in Support of SB 376
Before the Senate Natural Resources and Energy Committee
February 5, 2007

Chairman Lind, members of the Committee, thank you for the opportunity to testify in support of SB 376. My name is Gerald Mueller. I live at 440 Evans in Missoula.

I testify on behalf and at the direction of the Clark Fork River Basin Task Force (Task Force), the entity that asked for the introduction of this bill. The Task Force was established in 2001 by a state statute in response to concerns about Clark Fork River basin water rights, water supply and water management. A list of Task Force members is attached to this testimony. In this same statute, 85-2-350, the Task Force was assigned the job of writing a water management plan for the Clark Fork River Basin that identified options to protect the security of water rights and provided for the orderly development and conservation of water in the future.

The Task Force did prepare and send to the governor and the legislature in September 2004 the *Clark Fork Basin Watershed Management Plan (Plan)*. Much of the *Plan* was adopted into the State Water Plan in 2005.

Two key findings of the *Plan* were that because of lower basin hydropower water rights, water is unlikely to be legally available for appropriation for new water rights, and water rights junior to the hydropower rights are at risk of being called most of the time. The lack of legal availability of water in the basin was recently confirmed by a proposed DNRC hearings examiner ruling denying a water rights permit application.

To remedy this situation the *Plan* proposed that the state seek to negotiate a contract with the US Bureau of Reclamation (BOR) for water stored in Hungry Horse Reservoir. By contracting for Hungry Horse water, the state could then lease it to support new basin water uses and to mitigate the need for the lower basin hydropower utilities to make a call on junior water right holders. In 2005, the legislature passed House Joint Resolution 3, which urged DNRC to enter into negotiations with the BOR to determine the availability and cost of water stored behind Hungry Horse Dam for which the State of Montana might contract to support existing water use and future water development in the Clark Fork River basin.

In a September 2006 meeting with Mary Sexton, the BOR Regional Director, Bill MacDonald, stated that the state can contract for an amount of water in Hungry Horse, but not pay for the water until it would actually be used. In effect, through a contract, the state can reserve Hungry Horse water to support future Clark Fork River basin water uses.

An existing statute, 85-2-141, caps the total amount of water that the state can lease throughout the entire state to 50,000 acre-feet. This cap was originally passed in 1985 as a result of concerns raised by the Energy Transportation Systems, Inc. (ETSI), coal slurry pipeline proposal and the US Supreme Court Decision in Sporhase vs. Nebraska. The State of South Dakota had agreed to sell ETSI 50,000 acre-feet of water from the Oahe Reservoir to allow coal to be transported from coal fields near Gillette, Wyoming to Arkansas and Louisiana. In Sporhase, the US Supreme Court ruled that water is an item of interstate commerce, and as such, the states may not simply prohibit its export. The legislature, therefore, sought to limit, but not prohibit, the use of Montana water for such ventures. Additionally, the legislature saw water marketing as an

opportunity to fund other water related activities such as the statewide water rights adjudication, repairing state-owned water projects, repairing municipal water supply systems, etc. It therefore included in 85-2-141a requirement that federal water marketing revenue be shared with the state. SB 376 would change 85-2-141 in two ways. First, it raises the total amount of water that the state may lease for beneficial purposes. Instead of a blanket 50,000 state-wide cap, the state may lease up to one million acre-feet for beneficial uses when the source of the water is a federal reservoir and when the water leased is not used to transport water out of the basin in which the reservoir is located. The 50,000 acre-feet state-wide cap remains in effect for water transferred from one basin to another or out of state. The other change deletes the requirement that federal water marketing revenue be shared with the state. Water marketed by the federal government that is leased will not be a source of revenue for other purposes. Montana water users in leasing water from the state will pay only the costs of the leasing program. They will not be paying a water tax.

SB 376 also clarifies that no limit exists on the amount of water for which the state can contract from federal reservoirs. Such a limit is not a good idea for two reasons. First, the state can contract for more water than is needed immediately. Second, the state would pay for contracted water only when it is actually used. Thus through a contract for water in a federal reservoir, the state can in effect reserve water for future beneficial uses in Montana.

In closing, DNRC has not yet decided the amount of water that should be requested for Hungry Horse contract. Because of existing constraints on the operation of Hungry Horse, such as downstream endangered species flow requirements, we do not know how much of the BOR's existing 3.5 million acre-feet claimed by BOR in its water right for marketing would actually be available. The Task Force is convinced, however, that the request should not be limited to 50,000 acre-feet, the existing cap on state water leases. We believe that removing the cap, consistent with honoring the concern about inter-basin and out of state water transfers, would be good for Montana water users.

Please act favorably on SB 376.

Thank you.

Clark Fork River Basin Task Force

Name	Organization	Area/Interest Represented
Marc Spratt	RLK Hydro	Flathead Basin above Flathead Lake
Nate Hall	Avista	Hydropower Utilities
Holly Franz	PPL Montana	Hydropower Utilities
Matt Clifford	Clark Fork Pend Oreille Coalition	Conservation/Environment
James Steele	Confederated Salish and Kootenai Tribes	Indian Tribes
Gail Patton	Sanders County Commissioner	Basin Local Governments
Vacant		Clark Fork River Watershed below Flathead River confluence
Arvid Hiller	Mountain Water Company	Municipal water companies and the Clark Fork River Watershed between the confluence of the Blackfoot River and the Clark Fork River and the confluence of the Clark Fork River and the Flathead River
Elna Darrow	Flathead Basin Commission	Flathead Lake
Steve Hughes	Joint Board of Control	Flathead River watershed below Flathead Lake to the confluence with the Clark Fork River
Harvey Hackett	Bitter Root Water Forum	Bitterroot River watershed
Fred Lurie	Blackfoot Challenge	Blackfoot River watershed
Jim Dinsmore	Granite Conservation District & Upper Clark Fork River Basin Steering Committee	upper Clark Fork River watershed
Verdell Jackson, <i>Ex Officio</i>	State Representative	House District 6
Joey Jayne <i>Ex Officio</i>	State Representative	House District 15
Jim Shockley <i>Ex Officio</i>	State Senator	Senate District 45



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Department of Natural Resources and Conservation
P. O. 201601
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January 24, 2007

Dear Mary Sexton,

As a result of working as a legislator for 8 years on water issues, I believe that Montana has lost control of its water to the electrical power generation companies. This is evident by the fact that power generation water rights designed to maximize profit are being used to take water away from Montana citizens. My goal is to return that control to Montana for the benefit of all of its citizens as intended in the Constitution and state law.

For the last 6 years I have claimed that 85-1-122, MCA protects Montana's water for use by Montana's citizens by subordinating power generation water rights in the Clark Fork Basin. This statute was put in place to both allow the construction of the Cabinet Gorge Dam and protect water for irrigation and domestic use from all present and future power generation water rights in the water shed. The last sentence of the statute is: "Any present or future appropriations of water in the water shed in the state of Montana for irrigation and domestic use above said dam shall have priority over water for power use at said dam." This statement defines which appropriations, the area protected and the Cabinet Gorge dam which is located in Idaho.

I recently found evidence to support my claim which is attached. Comments by Governor John Bonner, 32 Legislative Assembly, Chapter 3 stated that 85-1-122, MCA was approved by the Attorney General as legally safe-guarding Montana water for irrigation and consumptive purposes above the Cabinet Gorge dam for the entire water shed, including subsequent dams. Legislative committee notes on SB9 and county commissioner meetings also indicate that 85-1-122 applies to all subsequent dams and indicates that section 85-1-122, MCA was a condition precedent to the construction of the dams and had to expressly be accepted by the dam owners.

I have submitted my written evidence to the Code Commissioner and he has concurred with my interpretation of the statute.

I respectfully request that this oversight be corrected by providing comments on or amending Avista's water right certificates to bring them in compliance with 85-1-122.

Sincerely,

A handwritten signature in cursive script that reads "Verdel Jackson".

Senator Verdel Jackson

cc: Governor Brian Schweitzer, Code Commissioner Greg Petesch

Appendix 3
Testimony in Support of House Bill 304
Before the House Natural Resources Committee
On Behalf of the Clark Fork River Basin Task Force
By Gerald Mueller
February 07, 2007

Chairman McNutt and members of the committee, my name is Gerald Mueller. I live at 440 Evans, Missoula, Montana. I submit this testimony in support of HB 304 at the direction and on the behalf of the Clark Fork River Basin Task Force.

The Task Force was created in 2001 pursuant to 85-2-350 MCA and directed by that statute to prepare a water management for the Clark Fork River Basin that would identify options to protect the security of basin water rights, and provide for the orderly development and conservation of water in the future. In September of 2004, the Task Force provided the required plan, entitled the *Clark Fork River Basin Watershed Management Plan*, to the Governor, legislature, and the public. A list of Task Force members is appended to this testimony.

Recommendation 8-6 in the plan states, "The Legislative Water Policy Committee should be re-established to increase the focus on water issues and water education for legislators."

The Task Force made this recommendation for three reasons. First, the quality of life and economy of all Montanans quite literally depend on access to water. None of us can live without it. Second, Montana's Constitution creates a unique role for the state and a unique duty of the legislature regarding water. Article IX, Section 3, paragraphs (3) and (4) state:

- (3) All surface, underground, flood, and atmospheric waters within the boundaries of the state are the property of the state for the use of its people and are subject to appropriation for beneficial uses as provided by law.
- (4) The legislature shall provide for the administration, control, and regulation of water rights and shall establish a system of centralized records, in addition to the present system of local records.

The Constitution makes no similar claims regarding any other natural resource. And third, understanding water law and the complexities of water administration and management is a challenging task, too challenging to be just one other topic area of the Environmental Quality Council. The effect of term limits and the increasing urbanization of Montana's population have reduced the legislature's first-hand knowledge of water law, administration, and management.

The cost identified in this bill's fiscal note, about \$73,500, is a small price to pay to increase the time and attention that the legislature through a water policy committee can devote to water and for the knowledge and understanding of the issues involved in its administration and management that will result.

Not passing this bill and funding a legislative water policy committee would truly be penny wise and pound foolish.

Thank you.